DIEDRE WILSON
v.
ACTING PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-75-A Decided February 14, 1992

Appeal from the denial of general assistance through the Bureau of Indian Affairs.

Affirmed.

1. Indians: Financial Matters: Financial Assistance--Indians: Lands: Generally

Lease income from trust lands is not specifically excluded by Federal statute from consideration as a resource available to meet an individual Indian's need within the meaning of 25 CFR 20.21, which governs the general assistance program of the Bureau of Indian Affairs.

2. Board of Indian Appeals: Jurisdiction--Regulations: Generally

The Board of Indian Appeals does not have authority to declare a duly promulgated Departmental regulation invalid.

APPEARANCES: Randall W. Robinson, Esq., Lewiston, Idaho, for appellant; Colleen Kelley, Esq., Office of the Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Diedre Wilson seeks review of a March 12, 1991, decision of the Acting Portland Area Director, Bureau of Indian Affairs (BIA; Area Director), finding that appellant was not eligible for BIA general assistance because of income received from a lease of trust land. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

Appellant, an enrolled member of the Nez Perce Tribe, was receiving BIA general assistance. In November 1990, her assistance was terminated on the

grounds that she had received lease income from interests she held in trust land in excess of the needs established for her family.

Appellant requested a hearing on her termination. A hearing was held at the Northern Idaho Agency (agency), BIA, on November 26, 1990. By letter dated December 14, 1990, the Acting Agency Superintendent (Superintendent) informed appellant that the termination decision was being upheld.

Appellant appealed this decision to the Area Director, who, by letter dated March 12, 1991, affirmed the Superintendent's decision:

> Your Statement of Reasons outlined in your January 14, 1991, correspondence provides three reasons as to why lease payments should not be counted as income under the general assistance program. All three reasons make reference to lease income being trust income.
>
> 25 CFR Part 20, Financial Assistance and Social Services Program, regulates the general assistance program. 25 CFR 20.21(f) requires that in determining eligibility for and the amount of the general assistance, all types of income and other liquid assets available for support and maintenance, unless otherwise disregarded under 20.21(g) or specifically excluded by federal statute, should be considered. Furthermore, 20.21(f)(2)(i) allows income from rental property to be counted as long as it's not excluded by federal statute.
>
> Our review of the agency records shows that [appellant] did have access to lease payments which had not been reported and/or taken into consideration by the Northern Idaho Agency in determining [appellant's] eligibility for and the amount of the general assistance grant. * * *
>
> Based on our review of these records, the agency was correct in considering the lease money [appellant] was receiving in determining her eligibility and the amount of her grant. Therefore, the agency's decision is upheld.

(Letter at 1-2).

The Area Director also found, however, that "the procedures used in determining the period of ineligibility [were] unclear." Id. at 2. Therefore, by memorandum dated March 13, 1991, he instructed the Superintendent

> to take the following actions to update this record and take corrective actions where appropriate.
>
> 1. Review 25 CFR 20.21(f)(3). While [appellant] receives lease money regularly, is the amount received the same each time, and is it received the same time each year?

It is our interpretation that you can prorate this income over the period it is received if the amount to be received and the date that it will be received are known in advance. OTHERWISE you are to treat this lease as income in the month it is received and a resource for the months following, keeping in mind the $1,000.00 disregard for resources.

Because the lease income may not come in regularly, it's important that you work out a reporting arrangement with [appellant] so that overpayment does not occur.

2. Update your records for the period beginning with the assistance applied for and received in May 1989 and including the February 1991 payments. There appeared to be some indication that purchase orders issued for [appellant] may not have been counted as grant funds for certain months during this period.

3. Make a final determination on [appellant's] eligibility and provide her with such notice according to 25 CFR 20.12 concerning her eligibility.

4. Provide this office with a written report, along with the documents that account for all actions taken to update and correct [appellant's] record. This report is due in my office by close of business, March 25, 1991.

The Board received appellant's notice of appeal from the Area Director's decision on April 9, 1991. Both appellant and the Area Director filed briefs on appeal.

Discussion and Conclusions

Appellant challenges only the legality of considering lease income from trust lands as a resource available to meet the needs of an individual in determining whether or not that individual is eligible for BIA general assistance.

Regulations governing BIA's general assistance program appear in 25 CFR Part 20. 25 CFR 20.21 provides in pertinent part:

(c) In States where the Bureau provides general assistance, Indians, in order to be considered eligible for general assistance under this part, must meet * * * the following conditions:

* * * * * *

(2) Must have insufficient resources to meet the basic and special need items defined by the Bureau standard of assistance.

* * * * * *

(e) Standards of Assistance. (1) Where the Bureau operates a general assistance program, its standard of assistance shall be the AFDC [Aid to Families with Dependent Children] payment standard used in the State where the applicant or recipient resides. In a State that meets 100 percent of the need standard, the Bureau standard is the need standard. In a State that does not meet need in full and applies a rateable reduction to the need standard, the Bureau standard is the rateable reduced amount. The AFDC payment standard incorporates the same basic and special need items as the AFDC standard of assistance, and is the amount from which the Bureau will subtract net income and liquid assets to determine eligibility for and the amount of the Bureau's general assistance payment.

* * * * * *

(f) Resources. In determining eligibility for and the amount of the general assistance payment, the Bureau shall consider all types of income and other liquid assets available for support and maintenance unless otherwise disregarded under § 20.21(g), [1/] or specifically excluded by Federal statute.
* * *

* * * * * *

(2) "Unearned income" includes but is not limited to:

(i) Income from: * * * rental property; * * *. All of the above shall be counted to the extent they are not disregarded by Federal statute.

Appellant first contends that 25 U.S.C. §§ 348 and 410 (1988), 2/ and case law interpreting them, prohibit considering lease income from trust lands as income for determining eligibility for general assistance. As pertinent to appellant's argument, section 348 provides that "at the end of the [trust] period the United States will convey the [property] by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever." Section 410 states:

No money accruing from any lease or sale of lands held in trust by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior.

1/ None of the disregards set forth in 25 CFR 20.21(g) apply in this case, and appellant makes no claim that they do.
2/ All further references to the United States Code are to the 1988 edition.

Appellant further argues that Article 3 of the Treaty with the Nez Perce, 14 Stat. 647, contains the same restrictions. The treaty provides that

> such tracts shall be exempt from levy, taxation, or sales, and shall be alienable in fee, or leased, or otherwise disposed of, only to the United States, or to persons then being members of the Nez Perce Tribe, and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior or the Commissioner of Indian Affairs shall prescribe.

The statutes and treaty provision cited by appellant do not address the general assistance program. Each is concerned with protection and preservation of trust lands, and therefore prohibits certain types of actions, such as taxation, attachment, levy, and sales, through which trust lands may be alienated or placed in jeopardy. To the extent that 25 U.S.C. § 410 addresses income from trust land, it specifically authorizes the Secretary of the Interior to approve the use of that income.

Appellant does not attempt to show that the authorities she cites directly support her argument. Instead, she argues by analogy that considering lease income from trust lands as a resource available to meet her needs "has the same impact upon [her] as an attachment [by rendering] money unavailable that otherwise would be paid" (Opening Brief at 3).

Assuming arguendo that the authorities appellant cites prohibit the diminution of income from trust lands, considering this income as a resource available to meet appellant's needs in no way diminishes her lease income. Appellant's argument must, therefore, be that general assistance moneys would otherwise have been available to her but for the allegedly improper consideration of her lease income.

The authorities and cases appellant cites do not support this argument. Rather, they are concerned with protecting trust lands so that the lands remain available to the Indian owner. Attachment, levy, taxation, and sales are all means through which trust lands could be lost to the Indian owner. Considering lease income from trust lands as a resource available to meet the needs of the Indian owner does not threaten the trust land. 3/

3/ It would be interesting to learn whether appellant would argue that substantial lease income or income generated from an Indian owner's personal use of trust land is also exempt from consideration as a resource available to meet the individual's need. The general assistance program is intended to provide supplemental funds “to promote personal and family unity and economic and social stability, working toward attainment of self-sufficiency” (25 CFR 20.3). If taken to its logical extreme, appellant’s argument would create the anomalous situation under which an Indian who had achieved a good standard of living, or even become wealthy through operating or leasing trust lands, would still be entitled to receive BIA general assistance, thus depleting the limited funds available to the detriment of those persons who were in actual need.

[1] However, even if the Board were to accept appellant's premise, it would still hold against her. No statute cited by appellant specifically excludes consideration of lease income as a resource available to meet her need within the meaning of 25 CFR 20.21. Therefore, such income is properly considered.

It is possible that appellant's argument with respect to 25 U.S.C. §§ 348 and 410 and the treaty is actually a challenge to the validity of 25 CFR 20.21 based upon her contention that the regulation violates Federal law. Appellant raises two other arguments that clearly challenge section 20.21. These arguments will be considered together.

Appellant's first argument is based upon her disagreement with the policy interpretations and decisions made in promulgating the regulation, and her belief that treating lease income from trust lands as a resource available to meet need constitutes a violation of the Federal trust responsibility:

> The issue of whether or not the [general assistance] program may count individual Indian moneys to deny or decrease [general assistance] benefits is a question of interpretation of the federal trust responsibility toward indigent Indian people, their trust lands and its income, and cannot be limited to the question of whether or not Congress has taken specific action to expressly protect trust moneys. On the contrary, federal Indian law principles require that federal agencies and federal courts presume that Indian land and Indian moneys are protected and exempt unless Congress expressly acts to limit those protections. [Emphasis in original.]

(Opening Brief at 5).

Appellant's second argument against the regulation is that inclusion of lease income is contrary to Congressional purpose, even if not to specific Congressional language. Appellant argues:

> The crop lease income, as discussed above, represent[s] a distinctive element of what it means to be Indian. The consideration of crop lease payments as income negates the significance such payments have to retention of the connection between the Indian people and their land. The consideration of crop lease payments as income represents a breach of trust, another act of exploitation of Indian people and so should cease.

(opening Brief at 10).

---

fn. 3 (continued)

It is also slightly ironic that one of the goals of the protection of lands allotted to individual Indians was to ensure that the land would not be improvidently removed from the individual's ownership so that it would be available to provide for his/her needs.

[2] The Board has repeatedly stated that it lacks authority to declare a duly promulgated Departmental regulation invalid. Kays v. Acting Muskogee Area Director, 18 IBIA 431 (1990); Utu Utu Gwaitu Paiute Tribe v. Sacramento Area Director, 17 IBIA 141 (1989) ; Navajo Nation v. Deputy to the Assistant Secretary--Indian Affairs (Operations), 16 IBIA 208 (1988); and cases cited therein. In the context of the present case, the Board lacks authority to hold that the regulation violates the letter or the spirit either of the authorities appellant cites or of other, more general, Congressional policies; or that the policy choices made by the Secretary in promulgating the regulation were incorrect or must be altered. Consequently, the Board does not address the issues relating to the validity of the regulation which appellant raises. 4/

Appellant objects to the Area Director's statement that the Board need not address some of her arguments because it lacks jurisdiction to declare a duly promulgated regulation invalid. Appellant contends that the Board is required to address each of her legal arguments, and that "[f]ailure to do so would violate the Administrative Procedure Act and Constitutional due process. The Board must publish a rule if it intends to ignore legal arguments. * * * The regulations governing this hearing do not state that the Board won't consider legal arguments. Hence, legal arguments must be considered" (Reply Brief at 3). Appellant also cites Matthews v. Eldridge, 424 U.S. 319 (1974), for the proposition that "[t]he exclusion of legal issues from the hearing process would insulate the administrative agency from the self-correcting mechanism that the United States Supreme Court has repeatedly held is constitutionally required." Ibid.

Neither the Administrative Procedure Act, the Constitution, nor the Supreme Court requires an administrative review tribunal to address legal issues over which it lacks jurisdiction merely because the issues were raised. Such a holding would constitute a waste of judicial resources, delay decisionmaking needlessly, and require administrative tribunals routinely to render advisory opinions on matters not within their expertise. Furthermore, the decision of a quasi-judicial forum, made in the context of a specific case before it, not to address an issue or issues because it lacks jurisdiction does not constitute an agency "rule" within the meaning of 5 U.S.C. § 551(4).

In addition, the "self-correcting mechanism" in agency rulemaking, which is the procedure appellant attacks in challenging the validity of a

---

4/ Appellant is, however, referred to 25 U.S.C. § 13d which provides:

"After September 30, 1985, no part of any appropriation * * * to the Bureau of Indian Affairs may be used directly or by contract for general * * * assistance * * * payments (1) for other than essential needs * * * which could not be reasonably expected to be met from financial resources or income (including funds held in trust) available to the recipient individual which are not exempted under law from consideration in determining eligibility for or the amount of Federal financial assistance * * *."

See also rulemaking for 25 CFR 20.21(f) at 50 FR 30688 (July 26, 1985) and 50 FR 39924 (Sept. 30, 1985).

regulation, is part of the rulemaking process. "Self-correcting mechanisms" exist through the opportunity for public comment on proposed rules and the right to petition for the issuance, amendment, or repeal of a rule. See 5 U.S.C. § 553(c) and (e).

Finally, appellant devotes an extensive argument to the proposition, essentially, that BIA cannot delegate to AFDC the operation of its general assistance program. Citing 25 CFR 20.21(e)(1), 5/ quoted supra, appellant argues that AFDC, which is not administered by BIA, does not have the expertise to administer a BIA program designed specifically for Indians, and that no deference to AFDC's expertise is warranted.

Appellant misreads the regulation. Section 20.21(e)(1) states that the amount of assistance available under the BIA general assistance program will conform to the levels established for the applicable state under the AFDC program. The regulation does not give AFDC any authority to make determinations relevant to administering the BIA general assistance program; BIA does not look to any part of the AFDC program other than the levels of assistance established for each state; and the policies behind the AFDC program are not considered under the BIA general assistance program. 6/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the March 12, 1991, decision of the Portland Area Director is affirmed.

_____
Kathryn A. Lynn
Chief Administrative Judge

I concur:

_____
Anita Vogt
Administrative Judge

_____

5/ Appellant's actual citation is to 20 CFR 20.2(e)(1). Because there is no such regulation, the Board assumes that appellant intended the citation given in the text of this opinion.

6/ See 25 U.S.C. § 13d-1:

"[G]eneral assistance payments made by the Bureau of Indian Affairs after April 29, 1985, shall be made on the basis of Aid to Families with Dependent Children (AFDC) standards of need except where a State ratably reduces AFDC payments in which event the Bureau shall reduce general assistance payments in such State by the same percentage as the State has reduced the AFDC payment."